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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

ORIGINAL COPY

No. 79-6281

IN RE: ADOPTION OF E.M.A.,
GEORGIA DIXON, Appellant

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

MOTION OF ~~AMICUS CURIAE~~, COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF JUSTICE, TO DISMISS OR AFFIRM

Margaret Hunting
Deputy Attorney General

Harvey Bartle, III
Acting Attorney General

Counsel for Amicus Curiae

Department of Justice
Strawberry Square, Room 42
Sixteenth Floor
Harrisburg, Pennsylvania 17120

July 24, 1980

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MOTION OF AMICUS CURIAE, COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF JUSTICE, TO DISMISS OR AFFIRM

The amicus curiae Department of Justice, Commonwealth of Pennsylvania, moves to dismiss or, in the alternative, to affirm the judgment of the Supreme Court of Pennsylvania on the grounds that the appellant, Georgia Dixon, has no standing to raise the constitutional objections upon which she relies and that the questions presented are so unsubstantial as not to need further argument.

QUESTIONS PRESENTED

1. Whether the appellant, Georgia Dixon, as a prospective adopting parent, has standing before this Court to challenge the constitutionality of the Pennsylvania Adoption Act on the ground that it denies an unmarried father rights with respect to the adoption of his child.

2. Whether the provisions of the Pennsylvania Adoption Act, which require appellant, as a prospective adopting parent not the spouse of a natural parent, to obtain the unqualified consent of the child's parents, are constitutional.

THE STATE STATUTE INVOLVED AND THE INTEREST OF AMICUS CURIAE

1. The Statute

In this appeal, Georgia Dixon, a prospective adoptive parent, is challenging the constitutionality of the provisions of Pennsylvania's Adoption Act[1/] requiring the consent of the adoptee child's parents to effectuate an adoption. 1 Pa.C.S. §411.

The Adoption Act requires that when an individual proposes to adopt a child consent must be obtained from, among others, "the parents or surviving parent of an adoptee." 1 Pa.C.S. §411(3). The Pennsylvania Supreme Court has held that, with respect to the consent required by parents, "[t]he severance of natural ties occasioned by adoption is of such obvious finality as to demand clear and unequivocal consent by a natural parent ...." In re: Adoption of Singer, 457 Pa. 518, 524, 326 A2d 275, 278 (1974).

The constitutional infirmity asserted by appellant arises from the provision in the Adoption Act for a qualified consent available when the consenting parent is married to the prospective adopting parent. Section 503 of the Adoption Act, titled "Retention of Parental Status," provides that "[w]henever a parent consents to the adoption of his child by his spouse, the parent-child

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1 Adoption Act of July 24, 1970, P.L. 620, 1 Pa.C.S. §§101-603, hereinafter referred to as the Adoption Act.

relationship between him and his child shall remain whether or not he is one of the petitioners in the adoption proceeding." 1 Pa.C.S. §503. Because she is unmarried to the adoptee child's father and therefore is precluded by the Adoption Act from adopting a child whose father wishes to retain his parental status, appellant Dixon asserts that the requirement of unqualified parental consent unconstitutionally discriminates against her.

2. Interest of Amicus Curiae

Georgia Dixon asserts in her statement to this Court that she initiated procedures under the Adoption Act to adopt the child E.M.A. Under the Adoption Act, a report of intention to adopt must be filed, as must a report of the intermediary attaching the consents of parents and others required by the statute together with other required documents. 1 Pa.C.S. §§331-34. An investigation is provided for as well as a hearing at which the adoptive parent must appear and at which testimony may be taken. 1 Pa.C.S.§§335, 421-24. These and other safeguards render a strict adversarial proceeding unnecessary and such a proceeding is not contemplated in the Adoption Act.

Georgia Dixon's petition for adoption was denied by the Allegheny County Court of Common Pleas because, contrary to the Adoption Act, she had obtained only the consent of one parent required under Section 411, the mother, whereas the father's consent to the adoption was conditioned on retaining his parental status with respect to the child. The lower court found that this conditional consent did not satisfy the requirements of the Adoption Act. In so finding, the Common Pleas Court rejected Georgia Dixon's argument that the statutory requirement of unqualified parental consent was unconstitutional because it discriminated against

petitioners who were not married to a natural parent. Opinion of the Court of Common Pleas, Allegheny County, January 11, 1979, appended to appellant's Jurisdictional Statement.

Georgia Dixon appealed to the Pennsylvania Supreme Court which issued an opinion affirming the decree below. In Re: Adoption of E.M.A., Pa. ,409 A.2d 10 (1979). Because there is no adversary in adoption cases in Pennsylvania, the Supreme Court, like the Common Pleas Court, reached its decision after reviewing only the appellant's position.

When the appeal was brought to this Court pursuant to 28 U.S.C. §1257(2), counsel for appellant promptly notified, and later served, the Attorney General of Pennsylvania under the misapprehension that it was a duty of the Justice Department to defend the constitutionality of Pennsylvania statutes. Because the decision that appellant's petition did not conform to the statutory requirements was reached without a formal adversary and therefore there is no interested party to defend against the constitutional challenge advanced here, the Department of Justice was asked to defend the application of the statute in this case.

The Attorney General of the Commonwealth of Pennsylvania serves exclusively as legal counsel to the Governor and various executive agencies and officials. Pennsylvania's Department of Justice has no authority to represent courts and divisions thereof and does not make it a practice to defend the application of the law by the judiciary of this Commonwealth. Nevertheless, the Attorney General has the power to defend the constitutionality of Pennsylvania's statutes and can exercise discretion in actively involving the Justice Department in a particular challenge. The

Department of Justice is therefore filing this Motion to Dismiss or Affirm in the capacity of Amicus Curiae, not as a representative of the judiciary or as an interested party, but specifically for the purpose of defending the constitutionality of the statute.

Not having been involved in the case through its initial levels, the Department of Justice does not dispute or attempt to restate facts as they are asserted in appellant's Statement of the Case.

ARGUMENT

1. Appellant Lacks Standing to Assert the Constitutional Rights of Third Party

The appellant in this case, Georgia Dixon, is the sole petitioner seeking to adopt the child E.M.A. Nevertheless, in her Jurisdictional Statement, and apparently in the lower court, she has framed the issue presented in terms of the parental rights of the father. Throughout her argument, appellant asserts the constitutional protections accorded the family and the parent-child relationship, claiming the strict judicial scrutiny required when the state acts to impinge a fundamental right explicitly or implicitly protected by the Constitution. She identifies the right of privacy, of freedom of association, and various other rights which have been identified by this Court as fundamental when exercised within the circle of the family relationship and claims that they have been violated by the Adoption Act.

None of these arguments is relevant, however, because the father is not a party to this appeal. Appellant Georgia Dixon, as a petitioner in an adoption proceeding, does not have standing to raise the rights of parents who are not parties to this appeal and with whom she is not similarly situated.

This Court has stated that in exercising power to decide the rights of third persons not before the court, the proper stance of federal courts is one of cautious reserve. "Federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to litigation." Singleton v. Wulff, 428 U.S. 106, 113 (1976). This caution has given rise to the general rule that a party may not attack governmental action on the grounds that it contravenes someone else's constitutional rights. This rule evolved as a result of the court's doubts regarding the wisdom of resolving issues unnecessarily, and the effectiveness of the issues' advocates. In Singleton v. Wulff, this Court explained the reasons behind the rule in this manner:

> First, the court should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. . . . Second, third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. The holders of the rights may have a like preference, to the extent they will be bound by the courts' decisions under the doctrine of stare decisis.
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> 2/

Id., at 113-14.

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2 The opinion of the court in Singleton v. Wulff, 428 U.S. 106 (1976), with respect to the standing issue quoted above, represents the view of four Justices. The concurring and dissenting opinion, also supported by four Justices, stated the standing issue, and the rule that a party cannot claim standing to vindicate the constitutional rights of some third party, even more adamently and unequivocably. Id. (Powell, J., concurring and dissenting, with the Chief Justice, Stewart, J., and Rehnquist, J.)

In the present case, appellant is seeking to assert the rights of the father of the child she is petitioning to adopt. Under the general rule enunciated by this Court that a litigant cannot raise the constitutional rights of third persons not party to the suit, appellant cannot assert the fundamental rights parents have to make decisions respecting their children. In addition, the appellant cannot be included under the narrow exceptions to this general rule.

In the rare cases where this Court has permitted a party to raise the rights of some non-litigant third party in support of their claim, the Court has looked to two factual elements which tend to remove the underlying justifications for the rule. The first of these is the existence of a close relationship of a confidential nature between the litigant and the third party. Such a relationship would insure that the litigant would have the identical interest of the third party and thus make an effective proponent of the right. The second element is the ability of the third party to assert his own right. Absent some genuine obstacle to such assertion, the failure of the third party to assert his own right creates the appearance that the right is not seriously threatened or that the right is not truly important to its holder. Singleton v. Wulff, id.

These exceptions do not apply in the present case. Initially, the appellant does not share a close and confidential relationship with the third party. As the unmarried petitioner for the adoption of his child, the appellant is not similarly situated with the father of the child and thus cannot represent his interests from his point of view. Rosario v. Rockefeller, 410 U.S. 752 (1973).

Neither does she have the interest of an advocate for fathers who wish to retain their parental rights without marriage to the adoptive mother. Because the father's parental status will remain the same regardless of the outcome of this litigation, the appellant's rights as petitioner can be decided without adversely affecting or diluting the rights of the father.

Secondarily, and even more strongly, there is no obstacle to the father's joining in the adoption petition and thus putting his rights squarely before the Court. His absence powerfully suggests his lack of concern with the outcome of these proceedings since he perceives that, whatever the result to Georgia Dixon, his rights with respect to the child will not be affected. This suggestion gains even more support from the assertion in appellant's Jurisdictional Statement of the father's unwillingness to enter into a marriage and his tendency, supported by the black urban culture of which he sees himself a part, to reject the conventional nuclear family. This tendency to reject the structure of marriage and the conventional family which appears in appellant's Jurisdictional Statement intimates that a similar lack of commitment to a formal adoption would keep the father from participating as a party in this case. In his absence, appellant cannot assert standing to raise his rights.

The constitutional rights that are asserted here are those of a father with respect to his child, not those of appellant. Appellant has not alleged or proved that any fundamental rights, guaranteed to her implicitly or explicitly by the Constitution, are violated by the state's actions in enforcing its Adoption Act. Tileston v. Ullman, 318 U.S. 44 (1943). The Court is unlikely to reach the important constitutional issues raised by this appeal because the party before the Court does not have standing to assert

them and, therefore, the appeal should be dismissed.

2. Pennsylvania is Constitutionally Empowered to Require Parental Consent in Adoptions

Appellant has asserted a violation of the Fourteenth Amendment to the United States Constitution because, as unmarried people, a petitioner in an adoption and the father of the adoptee child cannot take advantage of a provision in the Adoption Act permitting the spouse of an adopting parent to retain parental rights. As stated above, appellant has made general assertions of the Commonwealth's violation of various fundamental rights guaranteed by the Constitution and consequently demands that the Court strictly scrutinize the Adoption Act.

Strict scrutiny means that a state law, in this case the Adoption Act, is not entitled to the usual presumption of constitutional validity and a heavy burden of justification must be carried by the state. This sort of searching judicial review is required whenever a law operates to the disadvantage of a suspect classification of citizens or impinges on a fundamental right guaranteed by the Constitution. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, rehearing denied, 411 U.S. 959 (1973). Since classification by marital status has never been held to be a suspect classification, appellant does not assert this basis for requiring strict judicial scrutiny. Instead, she relies on the fundamental rights which she asserts are constitutionally guaranteed to parents in making decisions with respect to their children.

It has been stated by this Court that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." Id. at 33. Determining whether a right is fundamental thus does not involve weighing its societal significance against other rights protected by

the Constitution, but by reviewing the Constitution to determine if the right has been explicitly or implicitly guaranteed therein.

In careful analysis of the Constitution, this Court has found rights respecting family and children which are deemed basic and essential. These include the right to conceive and raise one's children; the recognition that the custody, care and nurture of the child resides first in the parents; and the recognition that the integrity of the family unit is protected in the due process clause. Stanley v. Illinois, 405 U.S. 645 (1971). Yet nowhere in the Constitution and the decisions interpreting it has there been found a fundamental right to adopt, be adopted, or have one's child adopted. Nor have any of the decisions respecting the fundamental right to raise children and decide their welfare been extended to include a right to have someone else raise one's children or for one to raise someone else's children.

When no suspect classification or fundamental right is found which must be protected by strict scrutiny, the statutory scheme in question must be examined to determine whether it rationally furthers a legitimate state purpose in order to survive the constitutional challenge. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, rehearing denied, 411 U.S. 959 (1973). In such circumstances, the statute in question is entitled to the traditional presumption of constitutionality. Id.

Where the constitution has not federalized the law in a certain area, such as in the area of adoption, state lawmakers are entitled to establish such systems as are preceived to be right and necessary as long as they are rationally related to a legitimate governmental purpose. Lindsey v. Normet, 405 U.S. 56 (1972). "[T]he power

to make rules to establish, protect and strengthen family life . . . is committed by the Constitution of the United States . . . to the legislatures of [the respective states]. Absent a specific constitutional guarantee, it is for the legislature, not the life-tenured judges of this Court, to select from among possible laws." Labine v. Vincent, 401 U.S. 532, 538 (1971); accord, Stanley v. Illinois, 405 U.S. 645 (1971). This Court has never taken unto itself the power to change the rules made by state legislators respecting areas constitutionally within their power in order to replace them with what others might think are better rules. Fiallo v. Bell, 430 U.S. 787 (1977); Mathews v. Diaz, 426 U.S. 67 (1976).

In the present case, the Legislature of Pennsylvania was exercising authority reserved to it by the Constitution in making a law permitting, and providing a procedure for effectuating, adoptions. Because there is no common law or constitutional right to adoption, adoptions are strictly statutory procedures and the rights and procedures provided for by the Adoption Act are the only means by which adoptions can be effectuated. Gunther Adoption Case, 416 Pa. 237, 206 A.2d 61 (1965).

The provision about which appellant complains, that unqualified, unconditional parental consent is required in order for an adoption to take place, is clearly reasonable and rationally related to the legitimate state purpose of promoting family integrity. The purpose of this requirement is to terminate the rights and responsibilities of the original parents and recreate those rights in the adopting parents. Without such a rule, the adoptee child and the adopting parents would lose whatever benefits are to be gained from the

separate family unit recognized by this society because parental rights and responsibilities would flow between the child and a stranger to the new family unit. Furthermore, it is clearly reasonable and in accord with the Commonwealth's interest in creating a healthy family structure to permit a parent to retain parental rights when that parent's spouse adopts the child. Any other rule would prevent the creation of a new family in the event of death or divorce of the first spouse.

Appellant appears to object that the circumstances in which a parent is entitled to permit an adoption while retaining parental rights are too narrow. It is well recognized, however, that the legislature is permitted to provide exceptions relieving some, although not all, from the strict operation of its law. Fiallo v. Bell, 430 U.S. 787 (1977). Similarly, the Constitution does not provide judicial remedies for every social disadvantage, no matter how important it is. Lindsey v. Normet, 405 U.S. 56 (1972). In making laws, it is often necessary to draw lines to distinguish between different circumstances and situations which may sometimes appear to produce harsh and arbitrary consequences to those who are situated near the border. Nevertheless, some lines are essential and "the party challenging the constitutionality of the particular line Congress has drawn has a burden of advancing principled reasoning that will at once invalidate that line and yet tolerate a different line separating some [individuals] from others." Mathews v. Diaz, 426 U.S. 67, 82 (1976); accord, Fiallo v. Bell, 430 U.S. 787 (1977).

In the present case, drawing the line somewhere else may seem to lead to a fairer result as far as the appellant is concerned.

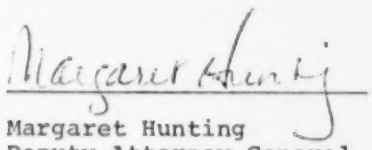
It remains the prerogative of the Pennsylvania Legislature, however, to select between the various available possibilities and, absent an unconstitutionally irrational result, to draw the line. In any event, appellant does not suggest an alternative delineation, but only implies that any restriction based on marriage would be unconstitutionally discriminatory. If the exception now available only to spouses of adopting parents were made the general rule, the results would be chaotic: with adoptions taking place while some parents retain parental status, a child could have any number of adults with parental rights and responsibilities flowing to him; a child might have several parents all of one sex; or a child might have parents who are brother and sister or even mother and son, just to name a few of the possibilities.

It is clear from the decisions of this Court that the Constitution has reserved to the Pennsylvania Legislature the power to make laws in this Commonwealth regarding adoption. That Pennsylvania's Adoption Act is reasonable and related to the legitimate state purpose of protecting the family is equally clear. Because there is no conflict with respect to these issues among the decisions of this Court, and because the decision of the Pennsylvania Supreme Court is in accord with the established law, the judgment below should be affirmed.

CONCLUSION

For the reasons stated herein, this appeal should be dismissed, or in the alternative, the decision of the Supreme Court of Pennsylvania in this case should be affirmed.

Respectfully submitted,



Margaret Hunting
Deputy Attorney General

Harvey Bartle, III
Acting Attorney General

Counsel for Amicus Curiae

Commonwealth of Pennsylvania
Department of Justice
Strawberry Square
Sixteenth Floor, Room 42
Harrisburg, PA 17120

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Appeal of Georgia Dixon

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

AND NOW comes Appellant, Georgia M. Dixon, by her attorneys, Joanne Ross Wilder, Esquire and Patricia G. Miller, Esquire, and respectfully requests leave to appeal in forma pauperis pursuant to Rule 53 of the Rules of the Supreme Court of the United States. In support of her motion, Appellant respectfully represents that:

1. Appellant is a United States citizen residing in Allegheny County, Pennsylvania.

2. Appellant appeals from the judgment of the Supreme Court of Pennsylvania affirming the decision by the Court of Common Pleas of Allegheny County of denying Appellant's petition to adopt her ward, E. M. A.

3. Appellant believes and therefore avers that she is entitled to redress on appeal.

4. Appellant is unable to pay the costs of this appeal or to give any security therefor or to pay for the printing of briefs and reproduction of the record on appeal.

5. Appellant is 34 years of age and has not been employed since 1970, shortly before the birth of her child. Prior to 1970 she was employed as an aide in a nursing home.

6. Appellant resides in public housing with her minor son and minor ward as a special "hardship case" entitling her to an adjustment in her rental to only two dollars ($2.00) per month.

7. Appellant's sole source of income for herself and the two children is presently a public assistance grant in the amount of three hundred two dollars ($318.00) per month.

8. Appellant owns no automobile or real estate and has no interest in any stocks, bonds, savings accounts or other valuable property.

9. Appellant must pay approximately forty-nine dollars ($49.00) per month for utilities, two hundred dollars ($200.00) per month for food, thirty dollars ($30.00) per month for transportation, twenty dollars ($20.00) per month for clothing for herself and the two children, as well as other expenses for necessities.

WHEREFORE, Appellant respectfully prays for leave to proceed on appeal in forma pauperis.

Respectfully Submitted,

JOANNE ROSS WILDER, ESQUIRE

PATRICIA G. MILLER, ESQUIRE

WILDER & MILLER, P.C.
600 Lawyers Building
Pittsburgh, PA 15219
412/261-4040

79-6281

AFFIDAVIT

Commonwealth of Pennsylvania :
: SS:
County of Allegheny :

Before me, a Notary Public in and for the said County and Commonwealth, personally appeared GEORGIA M. DIXON who, being duly sworn according to law, deposes and says that she is the Petitioner in the within appeal; that she is a citizen of the United States residing in Allegheny County, Pennsylvania; that she is filing this Affidavit and the foregoing Motion for Leave to Proceed on Appeal in Forma Pauperis; that this appeal is from the Pennsylvania Supreme Court's affirmance of a judgment of the Court of Common Pleas of Allegheny County dismissing her petition for adoption; that she believes that she is entitled to redress; that she is unable to pay the costs of this appeal or give security for the payment therefor; that she is impoverished; and that the facts set forth in the foregoing Motion which are within her knowledge are true, and that those facts which are set forth on the information of others, she believes to be true.

Georgia M Dixon
GEORGIA M. DIXON, Appellant

SWORN TO AND SUBSCRIBED
before me this 17th day
of March, 1980.

Elizabeth J Hamburg
Notary Public
Elizabeth J Hamburg, Notary Public
Mt. Lebanon Township, Allegheny County
My Commission Expires May 30, 1983
Member, Pennsylvania Association of Notaries